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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

JOHN BARTON PAYNE, *Secretary of the Interior*, and CLAY TALLMAN, *Commissioner of the General Land Office, plaintiffs in error*,
v.
THE UNITED STATES OF AMERICA, *ex rel.* ALLEN L. NEWTON.
} No. 123.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

The writ of error in this case brings up for review the judgment of the Court of Appeals of the District of Columbia which affirmed the judgment of the Supreme Court of the District, awarding a writ of mandamus commanding the Secretary of the Interior and the Commissioner of the General Land Office to issue a patent to relator upon his homestead entry for lands in the State of Washington.

In his petition (R. 1–3) relator Newton alleged that in 1904 he filed an application to enter certain lands within the Seattle Land District; that said

application was duly allowed and thereafter he made final commutation proof in support thereof, whereupon receiver's receipt and register's certificate were issued to him November 21, 1904; that at the expiration of two years from the issuance of said receipt and certificate no contest, protest, or other proceeding had been instituted against his final entry, but that on November 27, 1908, proceedings were instituted by the Land Department which resulted in the cancellation of the entry; that subsequently, upon application to the Secretary of the Interior, an order was entered May 14, 1918, directing the reinstatement of the entry and the issuance of patent thereon; that pursuant thereto, the entry was reinstated, approved for patent, and patent thereon was about to be issued when, upon intervention of the Department of Justice, issuance thereof was withheld; that notwithstanding the terms of the Act of March 3, 1891, ch. 561, 26 Stat. 1095, 1099, entitling petitioner to a patent upon his entry, the patent was being withheld.

To the rule to show cause issued upon this petition the Secretary of the Interior and the Commissioner of the General Land Office made answer (R. 6–8) that the land covered by Newton's homestead entry had, prior to the application for that entry, been withdrawn for forestry purposes and subsequently included in a national forest; that the allowance of Newton's entry in the face of this withdrawal, and the issuance of receiver's receipt and register's certificate on the proof tendered in support of said

entry, were obtained by Newton fraudulently and by false representations and proofs to the effect that he had made settlement upon said lands prior to the withdrawal and that he had since said settlement continuously resided upon the same and had placed substantial improvements thereon and had cultivated a portion of the lands; that these false representations and proofs were made by Newton with full knowledge of their falsity and with intent to deceive the officials of the Land Department and to induce them to allow his filing and to accept his commutation proof and to issue to him the receiver's receipt and register's certificate; that said officials were deceived thereby, and acted in reliance on said false and fraudulent representations.

It was further alleged in the answer that the action of the Land Department in cancelling the entry was predicated upon a specific finding that the entryman Newton had not established and maintained residence upon the land covered by his entry, said finding being based upon evidence adduced on behalf of both the Government and Newton at a hearing conducted pursuant to the rules of practice of the Land Department.

It was also averred that the decision of the Department of the Interior upon Newton's petition for the exercise of supervisory power, by which the entry was reinstated and patent ordered issued, was predicated solely upon the supposed lack of jurisdiction of that Department to entertain the proceedings which resulted in the previous cancellation of the

entry, and was in no way predicated upon a reconsideration of the facts in the case or a conclusion that the finding of facts was erroneous; that the evidence in the case clearly supports the conclusion that the issuance of final receipt and certificate was fraudulently procured through false testimony, and, were patent issued it would be the clear duty of respondents to request the Attorney General to institute a suit to cancel the patent; that in view of the clear, unequivocal and convincing evidence of fraud, the Attorney General, at the request of the Secretary of the Interior and Secretary of Agriculture, had instituted a suit in the United States District Court for the Western District of Washington against Newton and others to cancel the final receipt and certificate issued upon this entry and to quiet title in the United States to the land covered by said entry.

The petitioner demurred to the answer on the ground that the decision of this court in *Lane* v. *Hoglund*, 244 U. S. 174, disposes of all matters set forth in the answer and that all inquiry in regard to the validity of the entry was barred after the lapse of two years from issuance of receipt and certificate thereon.

The Supreme Court of the District of Columbia sustained the demurrer (R. 9) and awarded a writ of mandamus commanding the respondents to issue a patent to relator Newton.

Upon appeal, the Court of Appeals affirmed that judgment. R. 16–17. Opinion, R. 11–16, 48 App. D. C. 547.

ASSIGNMENT OF ERRORS.

(R. 18–19.)

1. The Court of Appeals erred in affirming the judgment of the Supreme Court of the District of Columbia in favor of the appellee Newton and directing the issuance of a mandamus against the appellants.

2. The Court of Appeals erred in not reversing the judgment of the Supreme Court of the District of Columbia in favor of the appellee Newton and directing the issuance of a mandamus against the appellants.

3. The Court of Appeals erred in holding that the limitation in section 7 of the act of March 3, 1891 (26 Stat. 1095), is jurisdictional and a complete bar after the lapse of two years from the issuance of final receipt and certificate to any action against a fraudulent entry prior to the issuance of patent.

4. The Court of Appeals erred in not holding that the limitation in section 7 of the act of March 3, 1891 (26 Stat. 1095), is not jurisdictional and not a complete bar after the lapse of two years from the issuance of final receipt and certificate to any action against a fraudulent entry prior to the issuance of patent.

5. The Court of Appeals erred in holding that after the lapse of two years from the date of the issuance of the receiver's final receipt the Land Department is without jurisdiction to cancel the final receipt for fraud.

6. The Court of Appeals erred in not holding that after the lapse of two years from the date of the issuance of the receiver's final receipt the Land Department has jurisdiction to cancel the final receipt for fraud.

7. The Court of Appeals erred in holding that after the lapse of two years from the issuance of final receipt, the United States has no right to invoke the aid of a court of equity to cancel for fraud the final receipt and certificate.

8. The Court of Appeals erred in not holding that after the lapse of two years from the issuance of final receipt, the United States has the right to invoke the aid of a court of equity to cancel for fraud the final receipt and certificate.

9. The Court of Appeals erred in affirming the judgment of the Supreme Court of the District of Columbia directing the issuance of a writ of mandamus pending the determination of the suit instituted in the United States Court for the Western District of Washington to cancel for fraud the final receipt and certificate.

10. The Court of Appeals erred in not reversing the judgment of the Supreme Court of the District of Columbia directing the issuance of a writ of mandamus pending the determination of the suit instituted in the United States Court for the Western District of Washington to cancel for fraud the final receipt and certificate.

PROPOSITIONS.

Under this assignment of errors we submit the following propositions:

1. A writ of mandamus should not issue in this case, in view of the pendency of the suit in equity brought to cancel for fraud the receipt and certificate issued on relator's entry.

2. The relator being guilty of fraud is not entitled to relief.

3. The proviso to section 7 of the Act of March 3, 1891, 26 Stat. 1095, 1099, does not bar action by the Secretary in cases of fraud.

ARGUMENT.

I.

A writ of mandamus should not issue in this case, in view of the pendency of the suit in equity brought to cancel for fraud the receipt and certificate issued on relator's entry.

We earnestly contend that the pendency of the suit which the United States has instituted in the United States District Court for the western district of Washington should stay the court in awarding mandamus.

That suit was filed at the request of the Secretary of the Interior and the Secretary of Agriculture. The requests for the action were predicated upon the clear, unequivocal and convincing evidence of fraud in respect to the securing of the allowance of the entry and the issuance of receipt and certificate upon the proof. There being fraud in the case it is certain that the Government has a remedy. If it cannot obtain this remedy in the Land Department it surely can obtain it in the courts.

It is no answer to this proposition to say that such remedy can be obtained in the courts only after the patent is issued, for, if the remedy exists, the issuance of patent is not a prerequisite to securing it. The Secretary of the Interior would do a vain and foolish

thing to issue a patent on an entry where fraud was shown and immediately after issuing the patent to ask the Attorney General to bring suit to cancel it. Much more would it be an anomalous thing for a court of justice, in the face of fraud, to compel the performance of an act in order that the consequences of that act might be avoided in a subsequent suit.

In *Knight* v. *U. S. Land Ass'n.*, 142 U. S. 161, this court quoted approvingly an excerpt from a decision of the Secretary of the Interior, which is particularly apt in this case, thus, at page 178:

> For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated, which it would be immediately his duty to ask the Attorney General to take measures to annul. It would not be a sufficient answer against the exercise of his power that no appeal had been taken to him and therefore he was without authority in the matter.

In the case of *Turner* v. *Fisher*, 222 U. S. 204, affirmance of the judgment below in refusing mandamus to compel the Secretary of the Interior to reenter relators' names on a roll of Creek Freedmen was predicated in part upon this proposition (p. 209):

> 7. To have issued the writ would have involved the useless thing of requiring relators' names to be reentered, and in other proceedings having their names stricken because the original enrollment had been procured by fraud, thus admitted by the demurrer.

The case of *People ex rel. Power* v. *Rose*, 219 Ill. 46, bears analogy to the case at bar. In that case mandamus was sought to compel the respondent Secretary of the State of Illinois to receive a report and issue final certificate of incorporation to relators forming the United States Express Company. The refusal of the Secretary of State was based upon the fact that the action demanded would be a fraud upon a corporation or joint stock company known as the United States Express Company (and referred to as the "old United States Express Company") which had for years been doing business in the State of Illinois and throughout the United States and foreign countries. The Supreme Court of Illinois found that under the allegations in the case, the "old United States Express Company" would have the right to restrain by injunction the use of the name proposed to be used by relators. In view of this mandamus was refused, the court saying (pp. 58, 59):

> The writ of *mandamus* will not be issued, if its issuance would fail to accomplish a good purpose, or to have a beneficial effect. "The writ is not granted as a matter of absolute right, and where it can be seen that it cannot accomplish any good purpose, or that it will

> fail to have a beneficial effect, it will be denied." (*Christman* v. *Peck*, 90 Ill. 150; *People* v. *Lieb*, 85 id. 484; *Illinois Watch Case Co.* v. *Pearson*, 140 id. 423.) It is difficult to see how the issuance of the writ in this case could accomplish any good purpose, or have any beneficial effect, if the new corporation, proposed to be organized, could be enjoined from using the name of the old company, and doing business under that name.

To require the Government to wait until patent issued before bringing suit to vindicate its rights might result in serious embarrassment. It might, for instance, be urged in defense of such a suit that the Government passed title to the land when it knew of the fraud as fully and completely as it did when it brought its suit. Again, the right of a transferee might intervene to the prejudice of the Government's right to recover the land.

The position of the relator in this case is well described by what this court said with respect to one in like circumstances in *Duncan Townsite Co.* v. *Lane*, 245 U. S. 308, 312:

> The relator having itself only an equity seeks the aid of the court to clothe it with the legal title as against the United States, which now holds both the legal title and the equity to have set aside an allotment certificate secured by fraud. A writ of mandamus will not be granted for such a purpose. See *Turner* v. *Fisher*, 222 U. S. 204.

II.

The relator being guilty of fraud is not entitled to relief.

The answer of the respondents in this case charged fraud upon the part of the relator with respect to his entry and the procuring of the evidences of his equitable rights. The demurrer of relator to this answer admits the fraud.

In this situation it is clear that the writ of mandamus should not be awarded. While mandamus is a legal process it is not a writ awarded as a matter of right,—rather its issuance is based upon equitable principles. The relator here does not come into court with clean hands, hence he has no standing such as would entitle him to the writ. The courts will not countenance fraud and the writ will not issue to condone or perpetuate a fraud.

> It is important that a person asking the aid of a mandamus for the enforcement of his rights should come into court with clean hands; and when the proceedings have been tainted with fraud and corruption, the relief will be denied, however meritorious the application may be on other grounds.
>
> *High* on *Extraordinary Legal Remedies* (3d ed.), § 26, citing *Commonwealth* v. *Henry*, 49 Pa. St. 530.

As was said by Mr. Justice Brandeis in delivering the opinion of this court in *Duncan Townsite Co.* v. *Lane*, *supra* (pp. 311, 312):

> Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial

> discretion. It issues to remedy a wrong, not to promote one; to compel the performance of a duty which ought to be performed, not to direct an act which will work a public or private mischief or will be within the strict letter of the law but in disregard of its spirit. Although classed as a legal remedy, its issuance is largely controlled by equitable principles.

The Court of Appeals apparently considered that this principle was not applicable to this case because it believed that the fraud was not well pleaded and hence not admitted by the demurrer. In disposing of this point the court, in our view of the case, lost sight of the proper application of the principle which we here assert.

Let us now consider the allegations of the answer. Newton had not applied to enter the land here involved when the withdrawal for forestry purposes was made. That withdrawal excepted from its force and effect only *valid* claims properly initiated prior to the date thereof. Answer, R. 6. Therefore, as to every other claim the withdrawal constituted an adverse and superior claim. When Newton applied to make entry it was essential that he show settlement upon the lands prior to withdrawal and continuous residence thereon from time of settlement, and also substantial cultivation of the tract. Had he failed to make that showing his application to enter would have been denied, and it was only because he made a showing that he had met these requirements that it was allowed.

The answer alleged that the allowance of his entry in the face of the withdrawal was secured by false and fraudulent representations with respect to prior settlement, residence, and cultivation.

Again, to warrant the issuance of receiver's receipt and register's certificate, it was essential that Newton, by the proof made by him should also show continuous residence upon the land and substantial cultivation from his first settlement until date of proof. The proof he offered was commutation. Section 2301, R. S., as amended by the act of March 3, 1891, ch. 561, § 6 (U. S. Comp. Stats. Ann., 1916, § 4589). To meet the requirements of the law as interpreted by the Land Department, the substantial continuous occupancy of the land by the entryman was essential. *James A. Hagerty*, 35 L. D. 252; *Fred Lidgett*, Id. 371. A higher degree of compliance with the law is required than under the ordinary *final* proof.

Since, as averred in the answer, the allowance of the entry and the issuance of receipt and certificate were obtained by false representations that relator Newton, both before and after the withdrawal and up to submission of proof, had resided continuously upon the land, the word "continuously" has an added and specific significance and importance.

If the answer had merely stated that the allowance of the entry and issuance of receipt and certificate had been obtained by fraud and by false and fraudulent representations, admittedly that would have been insufficient. However, we have in this case

such an allegation supplemented by a statement of the particulars in which the representations were false and fraudulent. This apprises the relator of the basis for the charge of fraud, and fulfills the fundamental requirements of good pleading.

It was particularly set forth in the answer that the reinstatement of the entry of relator was ordered solely because of the supposed lack of jurisdiction of the Department of the Interior to entertain the proceedings which resulted in the previous cancellation of the entry, and not because the conclusion of the Secretary on the contest proceedings was erroneous.

It is also distinctly averred that the evidence in the case clearly supports the conclusion that the issuance of receipt and certificate was fraudulently procured through false testimony and that if a patent were to issue it would be the plain duty of respondents to request that suit be instituted to secure the annulment of such patent; and that in view of the evidence of fraud a suit had been instituted and was then pending to cancel the entry.

The Secretary of the Interior, by his sworn answer in the case, avers that he has found fraud in respect to relator's entry, and that a suit has been authorized by the Attorney General to cancel the entry because of such fraud. These allegations, being admitted by the demurrer, abundantly justify the refusal of the writ.

In the case of *Turner* v. *Fisher*, *supra*, an answer of the Secretary of the Interior to a rule to show cause

upon a petition for mandamus was held sufficient as a defense when the allegation was that "on information and belief" the relators' "enrollment had been procured by fraud." It is true that reference was made to certain testimony upon which the Secretary had taken the action complained of. But in the case at bar, although the testimony adduced at the contest proceedings against Newton's entry was not made a part of the answer, the ultimate facts found by the Secretary and upon which he decided against the validity of the entry are pleaded.

We think the Court of Appeals did not keep clearly in mind the function of a writ of mandamus and the principles which control its issuance. If relator is not clearly and upon equitable principles entitled to the writ, it should be denied regardless of whether every technicality of precise pleading has been met. The first test is of the relator's right, not of the respondents' justification for refusing to act.

The courts are reluctant to award a writ of mandamus against an executive officer. *Lane* v. *Hoglund, supra.*

Presumption and intendment, so far as they go, must be in favor of returns, not against them, and it is sufficient if the return discloses a fair legal reason why the mandamus should not issue. *Springfield* v. *County Com'rs of Hampden*, 10 Pick. (Mass.) 58, 67; *The King* v. *Lyme Regis*, 1 Douglas K. B. 149, 157, 158, 159; *The King* v. *The Archbishop of York*, 6 Term Reports, 490, 493, 495.

III.

The proviso to section 7 of the act of March 3, 1891; 26 Stat. 1095, 1099, does not bar action by the Secretary in cases of fraud.

The courts below took the view that the instant case is not distinguishable from the case of *Lane* v. *Hoglund*, 244 U. S. 174, therefore they held that the Secretary of the Interior was without power to entertain proceedings against the entry after the lapse of two years from the issuance of receiver's receipt to Newton upon his entry, in view of the proviso to section 7 of the Act of March 3, 1891, ch. 561, 26 Stat. 1095, 1099 (U. S. Comp. Stats. Ann. 1916, § 5113), and only the ministerial duty remained to issue a patent.

We assert that the case is distinguishable from *Lane* v. *Hoglund*, because in that case there was no allegation of fraud in the procurement of the allowance of the entry and the issuance of final receipt and certificate, as in this case. The pleadings and agreed statement of fact in that case contained no allegation or statement that the entry had been cancelled for fraud.

Moreover, Hoglund's claim presented strong equities, and there were differences of opinion as to whether the evidence adduced in the proceedings in the Land Department showed noncompliance with the law. Both the local land officers and the Commissioner of the General Land Office rendered decisions in favor of Hoglund; the Secretary reversed those decisions and held that Hoglund had not com-

plied with the law as to residence and cultivation of the land and that the withdrawal of the land for forestry purposes attached and was superior to his claim. On petition for exercise of supervisory power, the First Assistant Secretary of the Interior, after referring to the evidence which showed continuous residence of over fourteen months after withdrawal, found (42 L. D. 405, 406, 407):

> It sufficiently appears from the record, in addition to what has been hereinbefore stated, that Hoglund made a valid settlement upon the land; that he has expended in the neighborhood of $1,000 in improvements thereon; that he was practically without means when the entry was made and that he expended his surplus earnings in improving the land; that six years have elapsed since the issuance of final certificate and there is no suggestion that he had sold or contracted to sell the land or the timber, or done any other act suggestive of speculation or bad faith, nor is there evidence that he has had any other home than on the land under consideration,

and held that in view of the equities, Hoglund's final proof might be accepted as commutation proof and that he be allowed to complete the entry as such.

Thereafter, Secretary Lane reversed that decision and held the withdrawal a bar to Hoglund's rights inasmuch as he was not found to have been in compliance with the law at the date thereof. *Svan Hoglund*, 43 L. D. 538; Id., 540, on petition for supervisory authority.

In the instant case we have all the Land Department officials deciding against the validity of Newton's entry and Newton, for nearly six years after cancellation of his entry, acquiescing therein. In this connection, it is important to note that the answer of respondents herein distinctly states that the reinstatement of relator's entry was ordered only because of the Land Department's *supposed* lack of jurisdiction to have entertained the proceedings under which the final judgment of cancellation was entered.

Therefore the decision in the *Hoglund* case is not a precedent in this case, and it must be read and construed in the light of the fact that the court had no question of fraud before it and consequently did not pass upon or consider the question of the effect of fraud upon the operation of the proviso to section 7 of the Act of March 3, 1891.

The proviso in question is as follows:

> *Provided*, That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor.

Now the Court of Appeals, in discussing the effect of concealed fraud, held the answer insufficient because it did not set up when the fraud was discovered, why not sooner discovered, etc. R. 13. We assert that if it be conceded that the Land Department has jurisdiction at all, it is for that Department in the first instance to determine the question of the timeliness of the proceedings sought to be instituted. If after the expiration of two years a contest is filed in the Land Department, it is for the Secretary to determine whether he has jurisdiction and that question must first be raised before him. Until he has made a ruling the matter is still *in fieri*, and in such a situation it is well settled that the courts will not interfere. *Minnesota* v. *Lane*, 247 U. S. 243.

In the case of *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.*, 190 U. S. 301, the complainant sought an injunction, receivership, and the quieting of title in it to certain lands embraced in a forest lieu selection made under the Act of June 4, 1897, 30 Stat. 11, 36, claiming full, complete and equitable title to the lands. It appeared that there was a protest then pending before the Land Department against the approval of said selection upon the ground that the land involved was mineral in character, but the complaint averred that such protest was insufficient to warrant a hearing as to the mineral character of the land because it failed to show certain facts.

On this point the court said (p. 308):

> If the Land Department has any jurisdiction over the subject matter, the question as

> to the sufficiency of the protest is one for the decision of that department, and its right to decide thereon is not taken from it by the averment of a legal conclusion contained in the complainant's bill that the department has no legal right to decide otherwise than in favor of the complainant upon the facts before it.

Now, if the Land Department has jurisdiction, the question of the sufficiency of pleading relative to discovery of the fraud, etc., is properly for the Secretary in proceedings before him. The Court of Appeals concedes that the Secretary has jurisdiction and then proceeds to pass upon questions of pleading and practice of which he alone would have cognizance if, as averred, he had jurisdiction to act. In other words, it vests him with jurisdiction but immediately takes it away before he can exercise it.

But we take even broader ground upon this question of the applicability of the proviso to section 7 and assert that in cases of fraud it is not operative. Such an interpretation of the proviso is at once consonant with the intent of Congress in enacting this legislation and the reason which prompted its enactment. The situation presented to Congress as the basis for the legislation was this:

A large number of final entries had been suspended by the General Land Office upon vague and indefinite charges of fraud. The Land Office was unable to have these cases investigated with any degree of expedition; the result was a practical blockade in

the issuance of patents to the serious prejudice of *bona fide* claimants. *Lane* v. *Hoglund*, *supra*, at page 180, citing Land Department decision in the case of *Jacob A. Harris*, 42 L. D., 611.

It is important to observe that the solicitude of Congress in the enactment of the legislation was for the *bona fide claimant* and it was for his relief and his benefit. To interpret it otherwise would be to impute to Congress a purpose to condone and reward fraud.

A further indication that the proviso was not to apply when fraud was known is shown by the language of the preceding portion of section 7. After providing for correction of clerical errors with respect to entries on public lands, it proceeds as follows (26 Stat. 1098, 1099):

> And all entries made under the preemption, homestead, desert-land, or timber-culture laws, in which final proof and payment may have been made and certificates issued and to which there are no adverse claims originating prior to final entry and which have been sold or incumbered prior to the first day of March, eighteen hundred and eighty-eight, and after final entry, to bona fide purchasers, or incumbrancers, for a valuable consideration, shall unless upon an investigation by a Government agent, fraud on the part of a purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the Land Department of such sale or incumbrance.